BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTHONY W. ALLEN Claimant	)	
VS.	)	
CLEARY BUILDING CORP. Respondent	)	Docket No. **1,063,145**
AND	)	
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the December 12, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) John Clark. Jonathan Voegeli, of Wichita, Kansas, appeared for claimant. Vince Burnett, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated December 12, 2013, and all pleadings contained in the administrative file.

ISSUES

Claimant alleged an October 4, 2012 work accident. The ALJ awarded claimant authorized medical treatment with Dr. Matthew Henry and ordered respondent to pay authorized and unauthorized medical expenses. Judge Clark noted that the parties agreed Dr. Terrence Pratt be appointed to perform an independent medical examination.[1] The ALJ's order states:

[1] On July 29, 2013, the ALJ, based on the agreement of the parties, entered an order appointing Dr. Pratt to perform an IME, which occurred on September 23, 2013.

> Dr. Pratt states that there are structural changes rated per the cervical MRI which were not reported previously.
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> > *"With the aggravation in relationship to the dish [sic] protrusion at C6-C7 is in relationship to his reported event as the prevailing factor."* (sic)
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> Dr. Pratt relates the Claimant's need for an evaluation at the C6-C7 level is the vocationally related event in 2012. He does not relate the lumbosacral involvement to his reported vocationally related event as the prevailing factor.
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> The Court finds that the Claimant injured his cervical spine out of and in the court [sic] of his employment with the Respondent on October 4, 2012.[2]

Respondent argues the preliminary Order should be reversed because: 1) claimant did not sustain personal injury by accident arising out of and in the course of his employment because there was no lesion or change in the physical structure of the body, and, 2) claimant's injury was an aggravation of a preexisting cervical spine condition and is therefore not compensable.

Claimant maintains he suffered a work injury that was the prevailing factor in his current need for medical treatment and therefore the ALJ's Order should be affirmed.

The sole issue for the Board's determination is: Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent?

FINDINGS OF FACT

Having reviewed the entire evidentiary record, this Board Member makes the following findings of fact and conclusions of law:

On October 4, 2012, while employed for respondent as a foremam, claimant was assisting in erecting a pole barn shed. He was working overhead inside the structure, applying adhesive tape to repair insulation that had accidentally been cut. The tape claimant was using dropped. He retrieved the tape and while raising back up, he hit the top of his head on what he described as a knee brace, knocking him to the ground. Claimant testified his hard hat came off when he hit the ground. He described the immediate aftermath of the accident as follows:

Q. And did you feel anything immediately?

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[2] ALJ Order at 1.

> A. It knocked me to the ground. I had pain in my neck and shoulders and kind of saw what you would call I guess they call them birdies or something, like little squirrelies. I told the other guy -- my guy saw me fall and helped me back up. And we went back to the hotel; the guy asked if I wanted to go to the doctor. I told him, you know, I just wanted to take a warm shower and try to relax and see what happens. The next morning I got up and couldn't hardly turn my head and stuff, so they told me to go to the office. I went there; they sent me to the company doctor. He requested an MRI, took me completely off work, and they had their company driver pick me up at the hospital and they drove me back to Oklahoma.[3]

Respondent authorized claimant to see the company physician, Dr. Lawrence Will. Claimant told Dr. Will he injured his neck when he hit his head on a brace. Dr. Will took claimant off work and recommended a cervical MRI scan, anti-inflammatory medication, heat and ice.

On October 10, 2012, respondent sent claimant to Urgent Care, where claimant was evaluated by a physician assistant, Deborah Holder. Claimant provided a history of having injured his neck when he hit his head at work. X-rays of the cervical spine, restricted duty, physical therapy and medication were prescribed. Claimant had a follow-up visit with Ms. Holder on October 16, 2012. Medication and restricted duty were again prescribed.

At claimant's next follow-up appointment with Urgent Care on October 22, 2012, he was seen by Dr. Wesley Ingram, who diagnosed bilateral C6-C7 radiculopathy. Physical therapy had yet to be authorized and it was again prescribed, along with medication, restricted duty and a cervical MRI scan. Claimant thereafter received no further authorized care, although the cervical MRI was eventually conducted on November 6, 2012. That study revealed: (1) disk bulges at C3-C4 resulting in moderate grade central canal stenosis with questionable early myelomalacia about the cervical cord; (2) right paracentral disk protrusion at C6-C7 resulting in mild mass effect on the ventral aspect of the cervical cord and moderate grade right-sided foraminal stenosis; and (3) post-surgical changes.[4]

Claimant testified at the preliminary hearing he was experiencing headaches, pain in his shoulder blades, tingling and numbness in his fingers, and trouble sleeping at night. Sometimes if he turns his head wrong or puts his head down he experiences "a vibration like electricity through [his] arms."[5]

Claimant sustained a neck injury working for another employer on October 16, 2001. He was off work for approximately six months and underwent surgical treatment consisting

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[3] P.H. Trans. at 8-9.

[4] *Id.*, Resp. Ex. 1, "Kovacs" records at 1.

[5] P.H. Trans. at 10.

of a three-level fusion at C4-C6. In 2007, claimant sustained another work injury, resulting in headaches, neck pain and extremity numbness. On August 31, 2010, claimant was involved in an automobile accident resulting in left shoulder and left hip pain. Claimant testified that from 2007 until October 2012, claimant did not have any medical treatment for his neck.

In connection with his prior cervical injuries, claimant underwent diagnostic tests, including cervical MRI scans on January 27, 2003, February 22, 2007, and January 10, 2008. He also had a cervical myelogram/CT scan on February 13, 2003. Documentation of the previous and current cervical diagnostic tests, and other prior medical records, appear to have been provided to the three examining physicians, Drs. Pratt, Murati and Fevurly.

At the request of respondent's counsel, Dr. Chris Fevurly evaluated claimant on March 14, 2013. He took a history, reviewed medical records and performed a physical examination. Dr. Fevurly diagnosed cervical myelomalcia with current myelopathic symptoms and neurogenic compromise of the cervical cord possibly at the C-4 and C-7 nerve roots. Dr. Fevurly opined:

> The work event on 10/4/12 aggravated the preexisting condition of the cervical spine (documented as present since 2001). It is clear that he currently has signs and symptoms from the cervical spine and cord but the prevailing factor is the preexisting central canal narrowing documented since at least 2007. It was just a matter of time (since 2007) that he would develop progressive cervical cord compression and cervical nerve root symptoms from these preexisting changes seen on MRI in 2007. The underlying degenerative changes and developmental narrowing of the cervical canal (documented as present since 2001) is the primary factor in relation to any other factor.[6]

At the request of claimant's counsel, Dr. Pedro Murati performed a medical evaluation on May 21, 2013. The doctor reviewed medical records, took a history and performed a physical examination. Dr. Murati diagnosed the following: (1) neck pain with signs of new radiculopathy; (2) bilateral carpal tunnel syndrome secondary to double crush syndrome; (3) myofascial pain syndrome of the bilateral shoulder girdles affecting the cervical and thoracic paraspinals; (4) low back pain with signs of radiculopathy; and (5) left SI joint dysfunction. Dr. Murati opined:

> The claimant sustained an accident at work which resulted in neck, upper back, and pain as well as headaches and numbness with tingling. . . . He does have a significant preexisting injury to his neck which required surgery. However, upon examination, findings for a new cervical radiculopathy were identified. He does admit to pre-existing injury to his left shoulder. However, he states that his pain

[6] *Id.*, Resp. Ex. 1, "Fevurly" records at 8.

> complaints fully resolved and he was in his general state of good health prior to this work-related injury. He has significant clinical findings that have given him diagnoses consistent with his described accident at work. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of [claimant's] conditions is the accident at work.[7]

By agreement of the parties, the court appointed Dr. Terrance Pratt to perform an independent medical evaluation. The doctor reviewed claimant's medical records, took a history and performed a physical examination on September 23, 2013. Dr. Pratt opined:

> In relationship to his cervical involvement, he has congenital changes resulting in stenosis. He has preexisting spinal stenosis including involvement above and below the level of his fusion. The February 2007 MRI is significant because at the C3-C4 level the anterior cord surface was contacted and flattened. There was a little CSF around the cord and the central canal was moderately narrowed. C6-C7 also revealed mildly narrowed central canal. In 2008, changes above and below the level of the fusion were noted. Then in 2012, primary changes above and below the fusion was noted but at that time the C3-C4 stenosis was moderate with questionable early myelomalacia, and at C6-C7, there was mild effacement of the ventral cervical cord and a right disk protrusion. The C6-C7 disk protrusion had not been reported specifically in any of the prior studies, meaning 2007 and 2008. So, it does appear that his C3-C4 involvement primarily relates to factors preexisting the vocationally related event and the C6-C7 involvement with the exception of the reported disk protrusion primarily relates to the preexisting involvement. There are structural changes noted per the cervical MRI which were not reported previously. Based on all of the information, he had aggravation of underlying involvement of his cervicothoracic region in direct relationship to his reported vocationally related event in 2012. With the aggravation in relationship to the disk protrusion at C6-C7 is in relationship to his reported event as the prevailing factor. Other changes in the cervical region primarily relates to his preexisting involvement of the region. An opinion from a spinal surgical specialist is needed in relationship to the possible myelomalacia of the spine and he is in need of a spinal surgical assessment in relationship to the C6-C7 involvement as well.
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> I would state that that need for the evaluation relates to his reported event with aggravation of underlying involvement of the cervicothoracic region for the C6-C7 level. I could not relate his lumbosacral involvement to his reported vocationally related event as the prevailing factor.[8]

CONCLUSIONS OF LAW

K.S.A. 2012 Supp. 44-501b(a), (b) and (c) provide:

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[7] *Id.,* Resp. Ex. 1, "Murati" records at 7.

[8] *Id.* at 12.

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
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> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

K.S.A. 2012 Supp. 44-508 provides in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> . . .
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> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor.

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[9] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[10] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

> An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> . . .
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

It seems clear the Kansas legislature, in enacting the May 15, 2011, amendments to the Act, intended to limit recovery in claims involving aggravations of preexisting conditions or which render preexisting conditions symptomatic. However, the legislature chose to use the term "solely" in conjunction with the word "aggravates" in K.S.A. 2012

Supp. 44-508(f)(2). "Solely" must be provided its plain meaning. The Kansas Supreme Court held in Bergstrom[11] as follows:

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

Thus, the issue in this review is not whether claimant's preexisting cervical condition was aggravated by claimant's accident, but rather whether the injury solely aggravated the preexisting condition.

Recent Board decisions are instructive on the issue. The Appeals Board has found accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite claimant also having an aggravation of a preexisting condition. These decisions tend to show compensability where there is a demonstrated physical injury above and beyond an aggravation of a preexisting condition:

- A claimant's accident did not solely cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.[12]

- A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.[13]

- A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.[14]

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[11] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[12] *Homan v. U.S.D. #259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

[13] *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

[14] *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB Jul. 13, 2012).

- An accident did not solely aggravate, accelerate or exacerbate claimant's preexisting knee condition where the court-ordered doctor opined the accident caused a new tear in claimant's medial meniscus.[15]

- Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable.[16]

- A motor vehicle accident did not solely aggravate, accelerate or exacerbate a claimant's underlying spondylolisthesis when the injury changed the physical structure of claimant's preexisting and stable spondylolisthesis.[17]

In all of these cases, the claimants proved their accidents were the prevailing factor in causing their injuries, medical conditions and resulting disabilities.

The undersigned Board Member affirms the finding of the ALJ that claimant's accident was the prevailing factor causing his C6-C7 disk protrusion and did arise out of and in the course of his employment. The accident did not solely aggravate a preexisting condition.

The physicians retained by the parties, Drs. Murati and Fevurly, disagreed on causation. The parties accordingly agreed to request the ALJ appoint Dr. Pratt to conduct a neutral medical evaluation. Dr. Pratt's causation opinion is somewhat confusing because, in expressing his opinion, the doctor used the terms "aggravation" and "prevailing factor." However, it is clear that Dr. Pratt concluded claimant's disk protrusion at C6-C7 was not reported in the prior cervical MRI scans. That protrusion was, however, apparent in the 2012 MRI, and "is in relationship to his reported [work-related] event as the prevailing factor."[18]

The C6-C7 disk protrusion is a new lesion or change in the physical structure of claimant's body caused by the accident. This accident did not solely aggravate claimant's preexisting cervical condition as to the disk protrusion at the C6-C7 level and the ALJ did not err in finding the injury at that level was compensable.

The undersigned Board Member finds claimant sustained his burden to prove he sustained personal injury by accident arising out of and in the course of his employment.

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[15] *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

[16] *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

[17] *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 20, 2012).

[18] P.H. Trans., Resp. Ex. 1, "Pratt" records at 5.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[19] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[20]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John Clark dated December 12, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2014.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable John Clark, ALJ

[19] K.S.A. 2012 Supp. 44-534a.

[20] K.S.A. 2012 Supp. 44-555c(k).